APPENDIX A

United States Court of Appeals
FOR THE EIGHTH CIRCUIT

No. 98-3789

National Federation of the Blind of Missouri, a Missouri not-for-profit corporation,	*	
Plaintiff - Appellant,	*	
Gary L. Wunder, an individual; Edwin C. Bryant, an individual; John Ford, an individual,	*	
Plaintiffs,	*	
National Federation of the Blind, Inc.,	*	
Plaintiff - Appellant,	*	Appeal from the United States District Court for the Eastern District of Missouri
v.	*	
Denise Cross, in her official capacity as Director of the Division of Family Services of	*	

the State of Missouri; Sally L. Howard, in her official capacity as Deputy Director and Supervisor of the Rehabilitation Services for the Blind of the State of Missouri,

Defendants - Appellees,

Mae E. Weston, in her official capacity as District Supervisor of the North St. Louis Office of the Rehabilitation Services for the Blind,

Defendant.

Submitted: May 13, 1999
Filed: July 12, 1999

Before LOKEN, HANSEN, and MURPHY, Circuit Judges.

MURPHY, Circuit Judge.

The Rehabilitation Services for the Blind (RSB) is a Missouri state agency which receives federal funding and which developed a policy prohibiting its employees from distributing literature or discussing services offered by consumer groups such as the National Federation of the Blind (NFB) and its local affiliate, National Federation of the Blind of Missouri (NFB-Mo). NFB and NFB-Mo brought this action against state officials for violating the

Rehabilitation Act, the First Amendment, and the Equal Protection clause. The district court[1] granted summary judgment to the defendants after finding that NFB and NFB-Mo lacked standing to pursue their claims under the Rehabilitation Act and that the other claims failed on the merits. NFB and NFB-Mo appeal from the judgment, and we affirm.

I.

RSB is a vocational rehabilitation agency serving blind Missourians. It is administered by the Missouri Division of Family Services and receives funding under the Rehabilitation Act, 29 U.S.C. §§ 720 - 796(1). RSB staff teach independent living skills, provide mobility training, assist with job searches, and provide counseling. Denise Cross is the Director of the Division of Family Services of the State of Missouri and in this capacity supervises the RSB. Sally L. Howard is the Deputy Director and Supervisor of RSB and is responsible for managing the agency's seven district offices throughout Missouri.

NFB and NFB-Mo are not for profit membership organizations which aim to promote integration of the blind into society on equal terms with the sighted. They offer support groups and services through volunteer networks, they distribute educational literature, and they engage in advocacy regarding issues of concern to blind persons. Their aggressive advocacy and support programs are built on the philosophy that blindness is a characteristic, not a disability.

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[1]The Honorable Rodney W. Sippel, United States District Judge for the Eastern District of Missouri.

They oppose programs that they feel emphasize the limitations of blindness.

The American Council of the Blind (ACB) and its affiliate, the Missouri Council of the Blind (MCB), are also not for profit organizations which advocate for the blind. They formed after a philosophical disagreement among NFB members led some to break away and start a new volunteer organization. Certain members of the Missouri chapter of the NFB were among those who encouraged the development of a spin-off organization. ACB and NFB and their local affiliates, MCB and NFB-Mo, promote differing philosophical approaches to blindness and compete for members, and there apparently continues to be some hostility between the competing groups. RSB considers both NFB and ACB and their local affiliates to be "consumer organizations" because their charters require that they be run by members of the blind community.

In the summer of 1994, MCB complained to the RSB that some of its counselors had been actively recruiting members for NFB-Mo. Then RSB director David Vogel wanted to avoid any perception in the blind community that RSB was not acting impartially, so he restricted the extent to which its counselors and other employees could tell clients about materials and services provided by MCB and NFB. He issued a policy in September 1994, instructing agency representatives not to suggest or recommend one consumer group over another or to reveal whether they belonged to either. The RSB central office provided each new client with some limited information about the consumer organizations and their phone numbers, but RSB staff were generally prohibited from distributing literature produced by the organizations. Although counselors could potentially receive special permission to distribute materials or suggest services

provided by one consumer group or the other, it does not appear that this ever occurred.

Sally Howard took over as director of RSB in April 1995, and she reaffirmed and strengthened the policy regarding consumer groups. She circulated a new memo in July 1995 supplementing Vogel's initial memorandum on the subject. This memo acknowledged that under existing policy, RSB staff were prohibited from directly passing out any kind of consumer group literature to clients, but also recognized that staff might often have clients who would benefit from the resources available from the consumer groups. The memo instructed staff to inform their blind clients of the existence of the two organizations and ask if they would like to sign a release of information to both groups. The names of clients who signed the release would be forwarded to both NFB-Mo and MCB, who could then inform the individuals about resources they had to offer.

Although defendants contend that RSB staff members retained some authority to inform clients about particular services, this issue is contested. In reviewing a summary judgment, all reasonable inferences from the facts must be drawn in favor of the non-moving party. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986). We therefore assume that literature produced by NFB and NFB-Mo can not be displayed in the RSB lobby or otherwise distributed by the agency, and that RSB staff can no longer inform individual clients about any specific relevant resource offered by either organization.

NFB-Mo objected to the RSB policy on the grounds that it chilled its speech and made it more difficult for it to reach members of the blind community. It apparently felt that the policy weakened its message to its competitive

disadvantage in respect to MCB, which has a different approach to blindness.

NFB-Mo and three of its members filed this action in August of 1996. They named as defendants Carmen K. Schulze, then director of the Missouri Division of Family Services, Sally L. Howard, director of RSB, and Mae E. Weston, an RSB district supervisor. The plaintiffs sought a temporary restraining order (TRO) and preliminary and permanent injunctive relief to bar these state officials from implementing the policy prohibiting RSB staff from handing out NFB and NFB-Mo publications or referring RSB clients to NFB-Mo sponsored programs or services.

On August 27, 1996 the district court[2] heard arguments on the TRO motion and denied it on the grounds that NFB-Mo had failed to demonstrate irreparable harm. MCB moved to intervene in the proceedings, but no action was then taken on its motion. Evidentiary hearings were held in October 1996 on the request for a preliminary injunction, and a different district court judge[3] ruled that NFB-Mo had failed to establish irreparable harm and denied the request. MCB's request to intervene was also subsequently denied.

NFB-Mo, through new attorneys, filed an amended complaint. This new complaint dropped the individual members as plaintiffs, but added NFB-Mo's parent organization, NFB. The amended complaint also eliminated Mae E. Weston as a defendant. In count I plaintiffs request

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[2]The Honorable E. Richard Webber, United States District Judge for the Eastern District of Missouri.

[3]The Honorable Carol E. Jackson, United States District Judge for the Eastern District of Missouri.

relief under 42 U.S.C. § 1983 to redress alleged violations of the Rehabilitation Act. They contend that the RSB policy violated the agency's statutory duties under the Rehabilitation Act to establish programs that make "'maximum utilization' of 'public or other vocational or technical training programs or other appropriate resources in the community,'" to maintain information referral programs and provide referrals to other agencies when appropriate, and to provide programs that enhance the individual client's choice and control in determining rehabilitation goals and objectives. Count II alleges that Schulze and Howard violated the plaintiffs' Equal Protection rights by permitting other similarly situated non-governmental organizations greater access to RSB and its clients. Counts III and IV raise two First Amendment challenges. The complaint requests a declaration that RSB's policies are unconstitutional or otherwise illegal and a permanent injunction prohibiting defendants from implementing the challenged policies. It also sought injunctive relief requiring that defendants establish programs to refer clients to community resources, including those offered by the plaintiffs. Finally, it requests attorney fees and costs and all other relief deemed appropriate.

Each side moved for summary judgment, and the district court granted the defendants' motion and dismissed all claims. The court found that NFB and NFB-Mo did not have *jus tertii* standing to bring their Rehabilitation Act claims because "it is not clear that the blind community, whose rights NFB is seeking to assert, is suffering any impairment of its enjoyment of services under the Rehabilitation Act." It also ruled that plaintiffs had not made out viable claims under the First Amendment or Equal Protection clause.

NFB and NFB-Mo argue on appeal that they do have standing under the Rehabilitation Act and that the court erred

in granting summary judgment to the defendants on the merits of their constitutional claims. After the appeal was filed Denise Cross, the new director of Missouri Division of Family Services, was substituted for her predecessor Carmen K. Schulze.

II.

A.

NFB (here and afterwards used collectively to include NFB-Mo also) asserts that it has standing in its own right to assert claims for violations of the Rehabilitation Act and that the court should also grant it *jus tertii* or third party standing to raise the claims of RSB clients who are not NFB members and are injured by the state's failure to provide information about NFB. It further argues it has representational standing to assert the rights of its members, consumers of RSB services who have been denied the right to have RSB counselors discuss with them services offered by NFB that might be appropriate to their needs.

We review de novo the district court's dismissal of appellant's Rehabilitation Act claims for lack of standing, Burton v. Central Interstate Low-Level Radioactive Waste Compact Comm'n, 23 F.3d 208, 209 (8th Cir. 1994), and our review is confined to the standing issue absent unusual circumstances not present in this case. Singleton v. Wulff, 428 U.S. 106, 119-21 (1976). We do not review the facts to see if appellants have proven their allegations, but instead accept as true all material allegations of the complaint so long as they are not incapable of proof at trial. National Wildlife Fed'n v. Agricultural Stabilization and Conservation Serv., 901 F.2d 673, 677 (8th Cir. 1990).

A party has standing to bring a claim only if it has satisfied constitutional standing requirements and if the court determines as a prudential matter that the party is the appropriate proponent of the legal rights raised. Federal courts only have jurisdiction to hear actual cases and controversies. U.S. Const. art. III, § 2, cl. 1. To show that an Article III case or controversy exists, the party must show it has suffered some actual or threatened injury that can be traced to the allegedly illegal conduct and that is capable of being redressed. Schanou v. Lancaster County Sch. Dist. No. 160, 62 F.3d 1040, 1045 (8th Cir. 1995). The party must also be the "proper proponent of the legal rights at issue." Singleton, 428 U.S. at 112.

At the summary judgment stage the party invoking federal jurisdiction must have at least alleged specific facts that, taken as true, demonstrate the party suffered an injury in fact, that is one which is "(a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical." Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992) (citations omitted); see also Arkansas Acorn Fair Hous., Inc. v. Greystone Dev., Ltd., 160 F.3d 433, 434 (8th Cir. 1998). This helps ensure that "the legal questions presented to the court will be resolved, not in the rarified atmosphere of a debating society, but in a concrete factual context conducive to a realistic appreciation of the consequences of judicial action." Valley Forge Christian College v. Americans United for Separation of Church and State, Inc., 454 U.S. 464, 472 (1982). Standing may be found when there is a concrete and demonstrable injury to an organization's activities which drains its resources and is more than simply a setback to its abstract social interests. See Havens Realty Corp. v. Coleman, 455 U.S. 363, 379 (1982). "Absent specific facts establishing distinct and palpable injuries fairly traceable to [the defendants' conduct]" the injury in fact requirement is

not satisfied. Arkansas Acorn Fair Hous., Inc, 160 F.3d at 435.

NFB contends it has a cognizable injury in fact because the RSB policy makes it more difficult for blind individuals who are not NFB members to learn about its services. This frustrates its organizational purpose and deprives it of access to RSB clients which it claims is required by the Rehabilitation Act. While it has alleged that the policy does not permit RSB to convey information needed by its clients, NFB has not alleged that the policy has impacted it in any measurable way. It has not alleged that NFB has suffered a reduction in membership, and there are no allegations that restrictions have been placed on its ability to provide information directly to the blind community or to its own members.

NFB also contends that the RSB policy which prevents counselors from providing information about it to agency clients is a denial of access sufficient to establish injury. It cites Adarand v. Pena, 515 U.S. 200 (1995), and Village of Arlington Heights v. Metropolitan Housing Dev. Corp. 429 U.S. 252 (1976), in support. In Village of Arlington Heights, the Court found that a low-income housing corporation had standing to challenge a zoning decision which barred it from building a particular planned housing project. 429 U.S. at 261-63. The Court reasoned that the corporation had already expended funds planning the project, and its objective of providing low-cost housing in an area of scarcity would be hampered by the zoning decision. Id. at 263. The Court emphasized that "the specific project MHDC intends to build, whether or not it will generate profits, provides that 'essential dimension of specificity' that informs judicial decision making," id. (citation omitted), and that the "challenged action of the petitioners stands as an absolute bar to constructing the housing MHDC had

contracted to place on the ... site" id. at 261. The plaintiff in Adarand was found to have standing to seek prospective relief on its claim that a classification system used to evaluate bids for certain government contracts was discriminatory even though it could not show it would be the low bidder on any particular contract. The asserted injury was the fact that a system had been put in place which would prevent it from competing on an equal footing. Adarand, 515 U.S. at 211.

The "denial of access" NFB seeks to redress here is the opportunity to have RSB employees advise clients of NFB resources. There is no allegation, however, that the policy stands as a bar to any NFB program or makes it uncompetitive. The policy also applies to the other blind-run advocacy organization in Missouri. Although the policy may cause NFB to turn to other methods of disseminating information about its programs, there is no allegation that it interferes with NFB's own activities. This record does not contain allegations similar to the injuries recognized in Village of Arlington Heights or Adarand.[4]

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[4]The partial dissent focuses on NFB's allegation that use by Missourians of the national job data base it runs in conjunction with the Department of Labor - Job Opportunities for the Blind (JOB) - decreased from eleven placements in the two years before September 1994, to one between April 1, 1995 and March 30, 1997. NFB did not allege that prior placements were the result of RSB referrals, and the allegation that five fewer Missourians had been placed per year does not establish a concrete, particularized injury to the organization itself. The deposition testimony of Marc Maurer indicated that NFB did not know how many JOB referrals were made through RSB either before or after the implementation of the new RSB policy, and Maurer acknowledged that nothing in the policy prevented NFB from conducting job fairs itself or distributing JOB information in Missouri.

NFB has not established a distinct and palpable injury to it sufficient to create a case or controversy within the meaning of Article III. Since NFB has not met the injury in fact requirement, it lacks standing to raise the Rehabilitation Act claims. See Arkansas Acorn Fair Housing, Inc., 160 F.3d at 435. In addition, because it has not established an injury in fact, we need not reach the issue of whether as a prudential matter it would be appropriate also to grant NFB jus tarda standing to bring claims on behalf of RSB clients who lack access to information about NFB services. See, e.g., Powers v. Ohio, 499 U.S. 400, 410-11 (1991) (the first criteria litigants must satisfy to bring actions on behalf of third parties is a showing that they themselves suffered an injury in fact, giving them a sufficiently concrete interest in the outcome of the dispute).

NFB alternatively argues that it has representational standing to bring the claims of its members. A membership organization may sue on behalf of its members if three criteria are satisfied. Its members must have standing to sue, the interests it seeks to protect must be germane to its own purpose, and neither the claim asserted nor the relief requested may demand the participation of the individual members. Hunt v. Washington Apple Advertising Comm'n, 432 U.S. 333, 343 (1977).

NFB alleges that its members are harmed because, even though they presumably know about the services available from their own organization, the RSB policy prevents its counselors from discussing these services and materials with them. NFB has not alleged that any of its members actually have been injured in this way, however, and the only injuries alleged are hypothetical. Without a concrete present or future injury, the individual members would not have standing to sue. Valley Forge Christian College, 454 U.S. at 472. Since NFB has not alleged that any

of its members have or will suffer an injury in fact, it does not have representational standing to bring Rehabilitation Act claims.

After considering all the bases on which NFB argues it is entitled to raise claims that state officials have violated their duties under the Rehabilitation Act, we conclude that it has not alleged facts sufficient to meet constitutional standing requirements. The district court did not err in dismissing the Rehabilitation Act claims.

B.

NFB also argues the court erred by dismissing its First Amendment claims.[5] In its view RSB has created a forum for the distribution of literature and discussion of topics related to blindness. They argue the RSB policy denies it access to this forum and thus violates its First Amendment rights. The district court determined that NFB had alleged an injury in fact on this claim because it had pleaded that its First Amendment rights were chilled by the RSB policy and that NFB was the proper proponent of its own First Amendment claims.

A grant of summary judgment is reviewed de novo, Kiel v. Select Artificials, Inc., 169 F.3d 1131, 1134 (8th Cir. 1999) (en banc), and will be affirmed only if, viewing the

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[5]NFB's complaint also alleged violations of the Equal Protection clause. On appeal, however, it has not argued that the district court erred by finding that it had not made out an Equal Protection violation or challenged its conclusion that NFB had made no attempt to show that similarly situated groups are given access which it is denied. Because NFB has not briefed issues relating to the dismissal of its Equal Protection claim, that part of the appeal is considered abandoned. See Fed. R. App. P. 28(a)(4); Malone v. Vasquez, 138 F.3d 711, 716 (8th Cir.), cert. denied, 119 S. Ct. 384 (1998).

facts in the light most favorable to the non-moving party, there are no genuine disputes of material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 257 (1986).

The challenged policy restricts the availability in RSB offices of written materials prepared by consumer groups such as NFB, and it restricts RSB counselors from discussing programs, materials, or services sponsored by such organizations. It does not, however, completely cut off NFB's opportunity to reach RSB clients through the agency because RSB staff may ask clients whether they want to sign a release to obtain information from the consumer groups. To the extent NFB's First Amendment claims rest on its inability to place its publications on RSB premises, the critical question is whether RSB operates a limited public forum.[6] If it does, NFB might have a First Amendment right to participate in the forum.

A limited public forum can only be created "by intentionally opening a nontraditional forum for public discourse." Cornelius v. NAACP Legal Def. and Educ. Fund, Inc., 473 U.S. 788, 802 (1985) (citations omitted). A

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[6]RSB believes it is also entitled to prevail under a nonpublic forum analysis, but we disagree. Restrictions on speech in a nonpublic forum are permissible so long as they are "reasonable and 'not an effort to suppress expression merely because public officials oppose the speaker's view.'" U.S. v. Kokinda, 497 U.S. 720, 730 (1990) (citation omitted). The director testified that "the purpose of the RSB policy is to promote unfiltered, even-handed access to information about the consumer groups devoid of any appearance of pressure or favoritism." NFB has not produced evidence sufficient to show the expressed intent was pretextual, and the policy cannot be said to focus on the content of the publications. To pass constitutional muster, it need only be a reasonable limitation; it need not be the most reasonable. Id.

government agency may create one by designating a place of communication for use by the public at large, for use by certain speakers, or for the discussion of specific subjects. Forbes v. Arkansas Educ. Televison Comm'n, 93 F.3d 497, 503 (8th Cir. 1996), rev'd on other grounds, 523 U.S. 666 (1998). Yet, "[a] practice of allowing some speech activities on [government] property do[es] not add up to the dedication of [that forum] to speech activities." U.S. v. Kokinda, 497 U.S. 720, 730 (1990).

The primary purpose of RSB is to advance the Rehabilitation Act goal of providing vocational rehabilitation programs for individuals with disabilities so that they may "prepare for and engage in gainful employment," 29 U.S.C. §720(2), and in fulfilling this mandate it necessarily makes a variety of information available to clients. RSB's own provision of information to clients and discussion of issues related to blindness cannot be characterized as the intentional opening by the agency of a forum for *public* discourse, however. See Cornelius, 473 U.S. at 802; see also Families Achieving Independence and Respect v. Nebraska Dept. of Soc. Servs., 111 F.3d 1408 (8th Cir. 1997) (en banc). NFB has not established that RSB has created a limited public forum in which it could have a First Amendment right to distribute its publications.

The main argument NFB attempts to raise under the First Amendment is based on a rather unique theory. NFB claims that the network of RSB counselors and teachers, established under the Rehabilitation Act, itself constitutes a limited public forum. It contends that but for the policy, many RSB counselors would distribute NFB literature and

discuss services available through NFB[7]. The RSB policy closes a channel through which NFB's message could otherwise be communicated indirectly to members of the blind community. Appellants have not cited any case in which such a loosely defined network of agency counselors dealing with clients has been found to be a forum for First Amendment purposes. The cases it relies on involve restrictions on an organization's ability to convey its message directly. See, e.g., Cornelius, 473 U.S. at 788 (plaintiffs sought to participate in charity drive); Police Dept. of Chicago v. Mosley, 408 U.S. 92 (1992) (plaintiffs sought to picket school); Forbes, 93 F.3d at 499 (plaintiff sought to participate in a televised debate). The district court therefore did not err in granting summary judgment on NFB's First Amendment claims.

III.

For the reasons discussed, appellants lacked standing to assert the claimed violations of the Rehabilitation Act and the district court did not err in granting summary judgment on their constitutional claims. The judgment of the district court is therefore affirmed.

LOKEN, Circuit Judge, concurring in part and dissenting in part.

I join in Part II.B. of the court's opinion. I also agree with the court's articulation of the law of standing in Part II.A. But I cannot agree that the National Federation for the Blind (NFB) has failed to allege sufficient injury in fact to

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[7]NFB does not appear to be attempting to assert the speech rights of the RSB counselors themselves which would of course raise standing issues we need not address.

afford it standing to challenge RSB's alleged violation of the Rehabilitation Act. Accordingly, I respectfully dissent in part.

In Village of Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252, 263 (1977), the Supreme Court upheld the standing of a non-profit developer to challenge a municipality's refusal to rezone land for the construction of racially integrated housing, in part because the refusal prevented plaintiff from fulfilling its charitable mission. The Court also determined that non-economic injury is sufficient to confer standing in Sierra Club v. Morton, 405 U.S. 727, 734 (1972), United States v. SCRAP, 412 U.S. 669, 686 (1973), and Havens Realty Corp. v. Coleman, 455 U.S. 363, 379 (1982). In this case, NFB has alleged similar, specific non-economic injury. In its Amended Complaint, NFB alleged that RSB's policy prevented NFB "from communicating with the blind citizens of Missouri who are either unaware of [NFB] or are unaware of the existence of a particular program, service, education, information or resource offered by [NFB]." More specifically, NFB alleged that use of its Job Opportunities for the Blind program by Missourians has decreased by 90% as a result of the policy, an allegation that was sufficiently supported at this threshold stage of the lawsuit by the deposition testimony of Marc Maurer, President of NFB. Thus, I read the record on appeal as containing a sufficient showing that RSB's alleged violations of a federal statute have injured NFB in the fulfillment of its essential charitable mission. Although I take

no position on the merits of NFB's Rehabilitation Act claims, I would not dismiss them for lack of standing.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

July 12, 1999

Re: 98-3789 Natl. Federation vs. Carmen K. Schulze

Dear Counsel:

Enclosed is a copy of the opinion filed today in the referenced case. Judgment in accordance with the opinion is also entered today.

Please review Federal Rules of Appellate Procedure and the Eighth Circuit Rules on post-submission procedure to ensure that any contemplated filing is timely and in compliance with the rules. Note particularly that petitions for rehearing and petitions for rehearing en banc must be received in the clerk's office within 14 days of the date of the entry of judgment. No grace period for mailing is allowed, and the date of the postmark is irrelevant. Any petition for rehearing or petition for rehearing en banc which is not received within the 14 day period for filing permitted by FRAP 40 may be denied as untimely.
(5148-010199)

Sincerely,

/s/ Michael E. Gans

Michael E. Gans
Clerk of Court

paw
Enclosure(s)
cc: Mary Ann L. Wymore
C. Christopher Brown
Paul Michael Rauschenbach
Robert St. Vrain

District Court/Agency Case Number(s): 4:96-CV-1694(RWS)

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

NATIONAL FEDERATION OF THE BLIND OF MISSOURI, et al.,	)	
Plaintiffs,	)	
v.	)	No. 4:96CV1694 RWS
CARMEN K. SCHULZE,et al.,	)	
Defendants.	)	

MEMORANDUM AND ORDER

This matter is before the Court on the parties' cross motions for summary judgement.

At issue is a policy (the "Policy") instituted at Rehabilitative Services for the Blind ("RSB"), an agency administered by the Missouri Division of Family Services. This policy prohibits RSB counselors from giving **any kind** of literature generated by consumer groups directly to RSB's clients. The National Federation for the Blind ("NFB") claims that this policy violates the Rehabilitation Act 29 U.S.C. § 720 et seq., as well as its rights under the First

Amendment and the Equal Protection Clause of the United States Constitution.

The Court finds that plaintiffs lack standing to bring their claim under the Rehabilitation Action and further that the Policy does not violate plaintiffs' First Amendment or Equal Protection rights. Therefore, summary judgement is granted in defendants' favor.

I. Factual Background

When considering a motion for summary judgment, the Court must view all facts in the light most favorable to the non-moving party. Fed. R. Civ. P. 56(c). See generally, Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249-50 (1986). The following facts are not disputed.

RSB is a Missouri agency that assists blind Missourians in obtaining employment and living independently. RSB receives funding under the Rehabilitation Act, 29 U.S.C. § 720.

The National Federation of the Blind and its co plaintiff National Federation of the Blind - Missouri (hereinafter collectively referred to organizations which seek to integrate the blind into society on equal terms with sighted persons. NFB seeks to do this primarily through support groups members.

The American Council of the Blind ("ACB") and its affiliate the Missouri Council of the Blind ("MCB") were at one time a part of the NFB. Conflict over the viewpoint and mission of the NFB resulted in the ACB and MCB separating from the NFB and starting their own volunteer member organization.

The NFB and MCB are referred to as "consumer organizations." They remain in conflict with each other. Further, both the NFB and the ACB/MCB actively solicit membership in their organization, exclusive of membership in the competing organization. According to the organizations themselves, competition between the organizations for membership is vigorous. The groups provide financial incentives to existing members for signing up new members.

The competition and conflict between MCB and NFB became an issue at RSB during the summer of 1994 because of complaints lodged by the MCB. Many of the counselors at RSB are members of either the NFB or the MCB. In 1994 RSB received complaints that the counselor members of the NFB had been soliciting members from RSB's clients during the course of RSB counseling. In particular there were complaints that an RSB employee required an RSB client to listen to NFB tapes when he was supposed to be providing orientation and mobility training to that client. RSB also received a complaint that RSB staff members had started an NFB chapter with their RSB clients. Finally, there had been general complaints that RSB had not been "even-handed" and objective in informing clients of the services provided by NFB and MCB.

In response to the MCB complaints about NFB member recruitment during RSB counseling sessions, Dave Vogel, then Director of RSB, issued the following policy directive:

> Rehabilitation Services for the Blind (RSB) believes that clients need to be aware of consumer organizations for the blind. They can benefit from programs sponsored by these organizations. Also, the peer interaction taking place within these organizations can be crucial

> in assisting the client to establish realistic goals and expectations. In an effort to make clients aware of consumer organizations, State Office staff will provide them with RSB, Missouri Council of the Blind (MCB) and National Federation of the Blind (NFB) approved information. Staff will not promote one organization over another. At no time will staff recruit for membership in an a consumer organization while functioning in their official capacity or recruit any individual who has become known to the staff member through their employment with RSB. Also, training materials produced by organizations of the blind must be approved by the Deputy Director, Division of Family Services/Rehabilitation Services for the Blind before being utilized by the clients. Any such activity or use of unapproved materials will be subject to disciplinary action including dismissal.

This policy was modified by Sally Howard upon her appointment to the position of Director of the RSB in April, 1995. Howard believed that the MCB and NFB posed a unique potential for conflicts of interest to arise as a result of the nature of the organizations, the conflict between them, and the membership of RSB staff in them. Howard did not want RSB clients to feel pressured to join either organization in order to benefit from the services provided by RSB.

Ms. Howard's directive recognized that at that time, new RSB client's received informational literature from both the NFB and MCB in a welcoming package distributed by RSB. It also recognized that the NFB and MCB were an important resource for RSB clients. But, that the "current policy restrict[ed] RSB staff from directly passing out **any**

kind of consumer group literature to consumers. " Finally, the directive indicated that whenever RSB staff felt that a client would benefit from the resources of a consumer group, staff should inform clients "that there are two consumer organizations with available resources and ask the consumer if he/she would want to sign a release of information to both groups." RSB would then forward the client's name to the consumer organizations which would contact the client directly. Ms. Howard stated "the advantage of this approach is it allows both NFB and MCB to inform consumers of what they have to offer without RSB staff "filtering" the resource. It further assures an even-handed, objective approach that protects staff from the appearance of favoritism."

It is this Policy which NFB claims violates the Rehabilitation Act and its First Amendment and Equal Protection rights.

II. Legal Standard

When considering a motion for summary judgment, the Court must determine whether the record, when viewed in the light most favorable to the non-moving party, shows any genuine issue of material fact. Fed. R. Civ. P. 56(c). See generally, Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249-50 (1986). To withstand summary judgment under Federal Rule of Civil Procedure 56 (c) , the non-moving party must provide sufficient evidence to show that a material factual dispute exists that requires resolution by the trier of fact. Anderson, 477 U.S. at 248-49.

III. Standing

Before examining the merits of plaintiffs' claims, the Court must first determine that plaintiffs have standing to

bring those claims. In determining standing the Court must answer two distinct standing questions. First, whether the plaintiff alleges an "injury in fact", that is, a sufficiently concrete interest in the outcome of their suit to make it a case in controversy subject to a federal court's Article III jurisdiction. Singleton v. Wulff, 428 U.S. 106, 112 (1976). The second question is whether, as a prudential matter, the plaintiff is the proper proponent of the particular legal rights on which they base their suit. Id.

Plaintiffs here allege an injury in fact. They clearly allege that their First Amendment rights are being chilled by the RSB policy. They also allege a violation of their rights under the Equal Protection clause. If the NFB prevails they claim the NFB will benefit because NFB's means of access to the blind community will be increased. A case in controversy in the constitutional sense clearly exists as to these rights. See, Singleton v. Wulff, 428 U.S. 106, 112 (1976).

The existence of a case in controversy does not end the analysis of whether plaintiffs have standing to bring these claims. The Court must still determine which rights the plaintiffs may assert in seeking to resolve the case in controversy. Singleton, 428 U.S. at 113. As stated above, in answering this question, the Court must decide whether the plaintiffs are the proper proponents of the particular rights they assert. It is axiomatic that the holder of a right is a proper proponent for an action asserting those rights. Further, in certain circumstances a party may be a proper proponent for the rights of others. Id.

In this case, there is no dispute that plaintiffs are the proper proponents of their First Amendment and Equal Protection claims and that they have standing to bring those claims. There is dispute however, about whether plaintiffs are the proper proponents of the claims based upon the

Rehabilitation Act. Plaintiffs' argue that they are a proper proponent of those claims under the doctrine of *jus tertii.*

The doctrine of *jus tertii* allows a party to bring an action based upon the rights of a third party if 1) the third-party's enjoyment of the right is inextricably bound up with the activity the litigant wishes to pursue, and 2) there is some genuine obstacle to the third-party's assertion of his own right. Singleton, 428 U.S. at 114-16.

The doctrine of *jus tertii is* to be applied with care and only where its underlying justifications are met. Singleton, 428 U.S. at 115. That is, only where the relationship of the parties is such that the Court can he certain that the third-party is first, suffering an impairment in its enjoyment of the right at issue, and second, that it wishes to assert that right.

The doctrine of *jus tertii is* not applicable in this case because it is not clear that the blind community, whose rights NFB seeks to assert, is suffering any impairment of its enjoyment of services under the Rehabilitation Act.

The Rehabilitation Act, 29 U.S.C. § 720 et seq. provides federal grants "to assist States to meet the current and future needs of handicapped individuals, so that such individuals may prepare for and engage in gainful employment to the extent of their capabilities." In order to be eligible for such grants, the State must formulate a plan which will "provide satisfactory assurances to the Commissioner that, in the provision of vocational rehabilitation services, maximum utilization shall be made of public or other vocational or technical training facilities or other appropriate resources in the community." 29 U.S.C. §721(12)(A).

NFB claims that RSB is not maximizing utilization of the resources which NFB has to offer. But, the NFB has come

forward with no evidence that its new membership or contact, with the blind community is diminished because of the RSB Policy, or would increase in its absence. Further, it appears from the record before the Court that the RSB is meeting its obligations under the Rehabilitation Act.

The Rehabilitation Act itself does not give the states any guidance on how to maximize utilization of community resources. However, guidance on that issue can be found in the Code of Federal Regulations. In particular, 34 C.F.R. § 361.52 provides that the State must provide each eligible individual the opportunity to make informed choices throughout the vocational rehabilitation process. The State's obligation is to "provide the individual, or assist the individual in acquiring, information necessary to make an informed choice about the specific services, including the providers of those services, that are needed to achieve the individual's vocational goal." 34 C.F.R. § 361-52(b) . Moreover, the state may meet that informational obligation by "[r]eferrals to other consumers, local consumer groups, or disability advisory councils qualified to discuss the services or service providers." 34 C.F.R. 361.52 (c) (3).

The information which RSB currently gives to clients appears to meet the obligations placed upon it by the Rehabilitation Act. RSB gives new clients an informational pamphlet regarding both the MCB and NFB. Further, clients are asked if they want to have their name forwarded to MCB and NFB so that they can get further information. If the clients are interested, RSB forwards the client's name and address to the consumer group.

Based upon the foregoing, it is not certain that the blind community is suffering an impairment in enjoyment of its rights under the Rehabilitation Act. Therefore jus tertii standing is inappropriate on this claim.

It should be noted that this case is distinguishable from the Singleton and Craig cases which the NFB cites in support of its standing argument. In those cases, the third-party was not able to get the services it was entitled to under the law because the litigants were prohibited from providing it. In the case at hand, there is no prohibition upon the NFB's provision of services to the blind community. There is instead a limitation on how the staff at RSB will provide their unique rehabilitative services to the blind community. The services of the RSB and the NFB are not identical, they are separate organizations with different missions, purposes, and obligations under law.

As stated previously, it is not appropriate to grant *jus tertii* standing when the underlying justifications for the doctrine are not present. One of those justifications is that the third-party is not able to enjoy his rights because of the challenged policy. That justification is not met in the case at hand.

The NFB does not have *jus tertii* standing to bring a claim under the Rehabilitation Act and summary judgment in favor of defendants on that claim is appropriate.

IV. First Amendment

Plaintiffs argue that the RSB has created a limited public forum and thus that any regulation of speech therein must be narrowly drawn to effectuate a compelling state interest. The RSB has not created a limited public forum because the speech which it allows is limited to only that speech which furthers the official business of the agency. A practice of allowing some speech activities on government property does not dedicate government property as a public forum. Summary judgment in favor of defendants on plaintiff's First Amendment claim is appropriate.

The existence of a right of access to public property and to speak thereon depends upon the character of the property at issue. Families Achieving Independence and Respect v. Nebraska Dept. of Soc. Services, 111 F.3d 1408, 1418 (8th Cir. 1997)(hereinafter F.A.I.R.). There are three types of public property: 1) the traditional public forum; 2) the limited or designated public forum; and 3) the nonpublic forum. Id. citing, Perry Educ. Ass'n v. Perry Local Educators Ass'n., 460 U.S. 37, 44 (1983) .

Traditional fora are such places as streets and parks which have traditionally been devoted to assembly and debate. F.A.I.R., 111 F.3d at 1418. In these fora, the State may not universally prohibit expressive activity, and content-based regulations must be narrowly tailored to achieve a compelling state interest. Id.

The second category, the designated public forum, consists of public property not traditionally opened to assembly and debate, but which the State has opened up for that type of activity. F.A.I.R, 111 F.3d at 1418. So long as the State maintains a forum that is generally open to the public, content-based restrictions on speech are governed by the same standard as those in traditional public fora. Id.

Finally, there is the nonpublic forum which consists of all other public property. In the nonpublic forum the State may institute any content-based regulation on speech which is reasonable and not an effort to suppress expression merely because of the speaker's point of view. F.A.I.R., 111 F.3d at 1419.

It is beyond dispute that the RSB is not a traditional public forum. This Court must then determine whether it is a designated public forum as plaintiffs contend or a nonpublic forum as argued by defendants.

In making this determination the Court must pay particular attention to the type of discourse that the government has allowed on the property. The government does not create a public forum by inaction. F.A.I.R., 111 F.3d at 1419, citing, Lee v. International Soc'y for Krishna Consciousness. Inc., 505 U.S. 672, 679-80 (1992) . Further, a public forum is not created whenever members of the public are freely permitted to visit a place. Id. Rather the government must intentionally open the nontraditional public forum for discourse. Id.

Moreover, the practice of allowing some speech activities in the nontraditional public forum does not make it a designated public forum. F.A.I.R., 111 F.3d at 1420. Where government property is not dedicated to open communication from all groups, the government may restrict use, without further justification, to those who participate in the forum's official business. Id. citing, Perry, 460 U.S. at 53. A state agency which permits groups to use its property for expression that furthers the official business of the agency does not thereby designate its office a public forum. Id.

In F.A.I.R, the Nebraska Department of Social Services gave access to its lobby to certain non-advocacy public service groups and prohibited others. Those groups which were allowed entry then established a presence in the lobby and directly disseminated literature to the Nebraska Department of Social Services, clients. The Eighth Circuit held that allowing speech which provided a direct benefit to its clients did not open the lobby up as a designated public forum.

The facts of this case are quite similar to the F.A.I.R case in that RSB does not allow all speech but does disseminate literature which it feels furthers its official business of providing a benefit to its clients. But, the degree

to which the RSB has opened up its facility for speech is even more limited than that of the Nebraska Department of Social Services. RSB does not allow *groups to set up a presence in* its lobby where it can engage in any speech it wants. There is no organizational presence at RSB at all. Rather, RSB staff hands out only that literature which it believes is particularly suited to the individual needs of the specific client. This is not the kind-of activity which would designate the RSB office a designated public forum.

Because RSB is not a designated public forum, the constitutional standard by which the Policy is measured is that of a nonpublic forum. As stated above, regulation of speech in a nonpublic forum must be reasonable and not an effort to suppress expression based upon viewpoint. F.A.I.R., 111 F.3d at 1420.

Sally Howard, Director of the RSB testified that the purpose of the RSB policy is to promote unfiltered, even-handed access to information about the consumer groups devoid of any appearance of pressure or favoritism. The Policy is a reasonable manner in which to ensure that the blind community is given access to consumer groups without feeling pressured to join those groups in order to receive benefits from RSB. Moreover, the Policy appears to be viewpoint neutral in that it prohibits direct dissemination of any consumer group literature. It applies evenly to both the NFB and it's rival the MCB. Moreover, the NFB has not come forward with any verified evidence that it is not applied to other similarly situated consumer groups with different views which may exist to serve the blind community.

Because the Policy is reasonable and viewpoint neutral it does not violate the First Amendment rights of the NFB. Summary judgment in favor of defendants on the NFB's First Amendment claim is appropriate.

V. Equal Protection

The NFB has no First Amendment right to directly disseminate its literature via the RSB staff. As a result of the Court's ruling on NFB's First Amendment Claim, NFB's equal protection argument fails unless NFB can show that similarly situated groups are allowed access which NFB is denied. See Perry, 460 U.S. at 55. The NFB has made no attempt to make that showing and the evidence in the record does not independently support such a finding. Therefore, the NFB has failed to state an equal protection claim. Summary judgment in favor of defendants on NFB's equal protection claim will be granted.

VI. Conclusion

Summary judgment in favor of defendants is appropriate on all of plaintiffs' claims. Plaintiffs lack standing to assert a claim under the Rehabilitation Act. Further, while plaintiffs do have standing to assert their remaining claims, the Policy does not violate plaintiffs' First Amendment or equal protection rights.

Accordingly,

IT IS HEREBY ORDERED that defendants' motion for summary judgment [#60] is **GRANTED.** All of plaintiffs' claims against each and every defendant are **DISMISSED** with prejudice.

IT IS FURTHER ORDERED that plaintiffs' motion for summary judgment [#67] is **DENIED**.

/S/

RODNEY W. SIPPEL
UNITED STATES DISTRICT JUDGE

Dated this 11th day of September, 1998

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

NATIONAL FEDERATION OF THE BLIND OF MISSOURI, et al.,	)	
Plaintiffs,	)	
v.	)	No. 4:96CV1694 RWS
CARMEN K. SCHULZE,et al.,	)	
Defendants.	)	

JUDGMENT

In accordance with the Memorandum and Order entered this same date,

IT IS HEREBY ORDERED, ADJUDGED and DECREED that defendants shall have summary judgment against plaintiffs, and plaintiffs' amended complaint is dismissed with prejudice, each party to bear its own costs.

/S/
RODNEY W. SIPPEL
UNITED STATES DISTRICT JUDGE

Dated this 11th day of September, 1998